JONAIDI MANSOR

v.

PP

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL WAHAB PATAIL J
[CRIMINAL APPEAL NO: 42-35-99]
13 SEPTEMBER 2000

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Sections 6 and 39A(2) - Possession of dangerous drugs - Section 37(d) - Presumption of possession - Whether proved*

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 37(d) - Presumption of possession - Whether prosecution discharged its burden of proof - Whether accused required to prove otherwise on a balance of probabilities*

CRIMINAL PROCEDURE: *Sentence - Possession of cannabis - Cannabis weighing 132.4 grams - Whether amount proved far less than 132.4 grams - Whether sentence excessive*

This was an appeal by the appellant against the decision of the sessions court convicting and sentencing him under ss. 6 and 39A(2) of the Dangerous Drugs Act 1952 ('the Act'). The appellant contended that the defence had in fact either rebutted the presumptions upon the appellant under s. 37(d) of the Act or had raised a doubt in relation to the factum of possession. He also alleged that the amount of cannabis that was proved was in fact far less than 132.4 grams, and that the sentence should reflect this smaller amount.

Held:

[1] It was not, and it has never been for the prosecution to prove how the drugs came to be in the bag. All that the law required is that such persons as may have had access to the bag were excluded. The prosecution had more than discharged its burden by calling and showing that the persons in the car at the time who had access to the bag did not have anything to do with the drugs found. (pp 767 g & 768 f)

[1a] The appellant had submitted that his mother, brother, niece or friends could have placed the drugs into the bag, but had not sought to prove his defence upon a balance of probabilities that they or any of them at least entered his room in his absence that night. (p 769 a-b)

[2] The nett weight of the representative samples was about 33 grams. The fact that the samples were representative was not challenged. That being the case, the positive results from the third and fourth tests showing 33 grams of samples to contain cannabinoids, serve to confirm that all of the 132.4 grams of plant material he found to be cannabis under visual and microscopic examination, was cannabis. (p 770 h)

[Appeal dismissed.]

Case(s) referred to:
Abdullah Zawawi Yusoff v. PP [1993] 4 CLJ 1 ***(refd)***
Mohamed Radhi Yaakob v. PP [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 ***(foll)***
Ng Kim Huat v. PP [1961] MLJ 308 ***(refd)***
PP v. Mohd Noor Jantan [1979] 2 MLJ 80 ***(refd)***
PP v. Wong Moy [1983] 2 MLJ 280 ***(refd)***
PP v. Yuvaraj [1969] 2 MLJ 89 ***(refd)***
Sia Soon Suan v. PP [1966] 1 MLJ 116 ***(foll)***
Ti Chuee Hiang v. PP [1995] 3 CLJ 1 ***(dist)***
Tong Peng Hong v. PP [1955] MLJ 232 ***(foll)***

Legislation referred to:
Criminal Procedure Code, s. 399
Dangerous Drugs Act 1952, ss. 2, 4, 5, 36, 37(d)

For the appellant - Gobind Singh Deo; M/s Karpal Singh & Co
For the respondent - Vong Poh Fah DPP

Reported by Suresh Nathan

JUDGMENT

Abdul Wahab Patail J:

The appellant Jonaidi bin Mansor is dissatisfied with his conviction and sentence by the Sessions Court, Kuala Lumpur on a charge (as amended) as follows:

> Bahawa kamu pada jam lebih kurang 5.00 pagi 16/12/97, di bawah Jambatan Lebuh Raya KESAS, Desa Petaling, Sungai Besi, Daerah Cheras, dalam Bandaraya Kuala Lumpur, dalam Wilayah Persekutuan sebagai orang yang tidak diberi kuasa di bawah Seksyen 4 atau 5 Akta Dadah Berbahaya 1952, telah didapati dalam pengawasan kamu Dadah Berbahaya, iaitu 55 peket plastik dadah cannabis yang beratnya berjumlah 132.4 gram, oleh yang demikian itu, kamu telah melakukan satu kesalahan di bawah Seksyen 6 Akta Dadah Berbahaya 1952 dan boleh dihukum dibawah Seksyen 39A(2) Akta Dadah Berbahaya 1952 Semakan 1932 Akta 234.

His counsel submitted 22 grounds of appeal in his petition of appeal. Nevertheless when the appeal was heard, his counsel proceeded on the grounds which may be summarised as follows:

That the learned judge erred in fact when in his grounds of decision he said at paragraph 7.8 that the brother was at sea:

> Menurut peguambela yang bijaksana kelonggaran atau ruang-ruang di atas memberi peluang kepada orang lain untuk memasukkan dadah itu ke dalam beg yang berkenaan. Saya mendapati hujahan ini "a bit too far fetch". Adalah agak sukar untuk mempercayai ibu OKT sendiri ingin menganiayai OKT. Demikian juga halnya dengan anak buah OKT yang masih kecil. **Sementara abangnya pula adalah seorang pelaut dan pada hari kejadian abangnya sedang belayar di laut**. Saya juga sukar untuk mempercayai bilik OKT yang mempunyai pintu/entrance tangga sendiri dan "self contained" tidak dikunci ketika dia keluar, selepas beliau siap mengemaskan begnya untuk makan malam. Ini memandangkan biliknya dilengkapi dengan barang-barang berharga seperti peti TV, video dan alat-alat memasak yang lain, termasuk beg yang penuh berisi baju bola yang baru yang menurutnya beliau ingin menjualnya di Seremban. Demikian juga berkenaan dengan dakwaannya bahawa pada kebiasaannya beliau tidak mengunci biliknya ketika keluar dari rumah. Sukar juga untuk mempercayai kawan-kawannya akan datang dan masuk ke biliknya walaupun ketika dia tidak ada di rumah. Sikap ini bukanlah cara, adat atau kebiasaan orang-orang bandar di negara ini.

Given the fact the prosecution put the question to the accused that his evidence of others having access to his room was his invention, it is clear that the narrative upon which the prosecution's case unfolds includes the fact that the accused room was always locked and never frequented by others.

That the defence had in fact either rebutted the presumptions upon the accused under section 37(d) or had raised a doubt in relation to the factum of possession.

That the amount of the dangerous drug cannabis that was proved was in fact far less than 132.4 grams.

Counsel relied upon the evidence of the investigating officer Insp. Zainol Hisham Abu (PW5) for his first ground above. PW5 had said in the course of his testimony that:

> Pada 10/3/98 jam 10.00 am, saya pergi ke rumah no 48C, Jalan Rejang 3, Setapak Jaya, Setapak, Kuala Lumpur. Tujuan – untuk menyiasat rumah OKT. Saya rakamkan percakapan Johar bin Mansor. Abang kepada Jonaidi bin Mansor. Dia berkerja sebagai Pelaut dan balik hanya 6 bulan sekali. Dari siasatan, ini adalah rumah dimana OKT tinggal. ….

The offence was alleged to have occurred in the early hours of 16 December 1997. Thus the recording of the statement of the brother Johar bin Mansor was made three months after the alleged offence. No question was put to PW5, in cross-examination of PW5, that Johar bin Mansor was in the house on 15

December 1997 to 16 December 1997. If Johar bin Mansor was at the house on 10 March 1998, and he returns home after every six months at sea, it would be fair at first glance to conclude as the judge did, that he was at sea on 16 December 1997. In any case the matter was not put in issue when PW5 was available for cross-examination.

The testimony of other prosecution witnesses, Mohd Sazali bin Ramatolah (PW6), Rafaunnizam bin Rafie (PW7) and Wan Mohd Radzi bin Mohd Ramli (PW8) were that no other persons in the appellant's room where they were in with the appellant. They did not see other occupants of the house. The defence did not put to these witnesses that Johar bin Mansor was in the house. If the presence of Johar bin Mansor was important to the defence in that it is alleged that Johar bin Mansor may have put the dangerous drug into the bag where it was found, that question was not put by the defence. Instead the defence put to PW7 as follows:

> S: Sekiranya sesiapa - Sazali atau Radzi buat apa-apa keatas beg itu awak tidak akan nampak?
>
> J: Ya.

It is clear the involvement of Johar bin Mansor on 15 December 1997 to 16 December 1997 was not in the mind of the defence at the time of the examination of the prosecution witnesses. Even in his own testimony in defence, the appellant did not say Johar bin Mansor was in the house on those dates. In other words, that Johar bin Mansor may have been responsible for putting the dangerous drugs cannabis in the bag was not part of the defence.

Since whether or not Johar bin Mansor was around was not made to be an important issue during trial in that it was never put into issue, it was therefore not necessary for the learned judge to make a finding upon it. Thus whether or not the learned judge was correct to conclude that Johar bin Mansor was away at sea is therefore not, on its own in the circumstances of this case, material. It is disappointing that it is now sought to be made an issue at the appeal stage when clearly no foundation was laid in the trial, and there is therefore no basis for the submission.

This leads us to the second ground, that given the fact the prosecution put the question to the accused that his evidence of others having access to his room was his invention, it is clear that the narrative upon which the prosecution's case unfolds includes the fact that the accused room was always locked and never frequented by others.

Clearly the argument has little merit at face value. The question put in cross-examination has the simple purpose of putting on record that that part of the testimony of the witness the question refers to is not accepted or conceded. The argument that such question makes it part of the narrative of the prosecution case that room was always locked and never frequented by others has, in context, no merit whatsoever. The narrative of the prosecution case according to the charge is that the accused was found in possession of the dangerous drugs cannabis in a car at about 5am on 16 December 1997, under the Jembatan Lebuh Raya KESAS, Desa Petaling, Sungai Besi, Daerah Cheras, in the Federal Territory of Kuala Lumpur. It was the defence case that the appellant had packed the bag earlier the previous evening and had left the bag unattended for some time in a room to which others have access. It is misleading therefore to say that it was the narrative of the prosecution case that the room was always locked and never frequented by others.

Counsel submitted as follows:

> What he believes is immaterial. He cannot assume, speculate or add suspicions and conjecture. Submit a gap exists. At the very least the mother ought to be offered. Even offer is not sufficient – as they have to adduce the evidence.

The part of the judgment counsel was referring to was the part where the learned judge held:

> Saya juga sukar untuk mempercayai bilik OKT yang mempunyai pintu/entrance tangga sendiri dan "self contained" tidak dikunci ketika dia keluar, selepas beliau siap mengemaskan begnya untuk makan malam. Ini memandangkan biliknya dilengkapi dengan barang-barang berharga seperti peti TV, video dan alat-alat memasak yang lain, termasuk beg yang penuh berisi baju bola yang baru yang menurutnya beliau ingin menjualnya di Seremban. Demikian juga berkenaan dengan dakwaannya bahawa pada kebiasaannya beliau tidak mengunci biliknya ketika keluar dari rumah. Sukar juga untuk mempercayai kawan-kawannya akan datang dan masuk ke biliknya walaupun ketika dia tidak ada di rumah. Sikap ini bukanlah cara, adat atau kebiasaan orang-orang bandar di negara ini.

It was not part of the defence in the testimony of the appellant that his mother Sabariah Ali, his niece Juwita Adayu or his brother Johar bin Mansor put the drugs into the bag. He merely said they stayed in the same house. While he said that his room was usually not locked, and his friends often come when he is not in the house or the room, he qualified that "Tetapi saya tidak tahu." It is obvious he could not know his friends went to his room when he was not around. His testimony in this respect was:

Ketika kejadian, anak buah saya (anak abang) Juwita Adayu, emak saya - Sabariah Ali dan abang saya Johar Mansor tinggal bersama saya di rumah itu.

Selalunya bilik saya tidak berkunci. Pada malam itu ia tidak berkunci.

Kawan-kawan saya selalu datang kerumah saya. Walaupun saya tidak ada dalam bilik atau rumah. Tetapi saya tidak tahu.

At p. 106 of the notes of proceedings (p. 122 of the record of appeal), there was this exchange during cross-examination:

S: Pada malam itu awak kelihatan takut dan mengigil semasa dadah dijumpa?

J: Tidak setuju.

Pada malam itu saya telah lihat ibu, abang dan anak buah saya masuk kebilik saya. Juga tidak lihat sesiapa keluar masuk bilik saya.

S: Barang kes dadah awak masukkan ke dalam beg kecil pada malam itu …

Only in cross-examination he said he had seen his mother, brother and niece had entered the room. But that was promptly largely contradicted by his next sentence that he did not see anyone enter or leave his room. The evidence that any of these person persons did enter his room is therefore contradictory. Yet it was not clarified in re-examination. He did not call his mother, brother or niece, or any of them to clarify the matter.

The appellant's room was not a room in the house but alongside, with his own entrance. It is also to be noted that the appellant did say clearly his mother Sabariah Ali, his niece Juwita Adayu or his brother Johar bin Mansor were staying in the house, but contradicted himself as to whether they actually went into his room that night. In view of the fact that these shortcomings arise from the defence testimony, the argument that other persons have access to his room is assumption, speculation, suspicion and conjecture, and the submission, in the circumstances borders upon being presumptuous and disregards the weight of his own defence evidence.

The charge is simply that the dangerous drugs cannabis was found in the bag acknowledged by and belonging to the appellant. In his testimony he also said:

… Saya keluar dari kereta bila seorang anggota polis tanya siapa yang punya beg. Ditanya pada orang di belakang dan saya terdengar.

Saya terus keluar dan katakan ini beg saya.

Section 37(d) of the Dangerous Drugs Act 1952 applied therefore to presume that he had possession of the dangerous drugs cannabis in the bag and that he knew the nature of it. The same section provides it shall be so presumed unless the contrary is proved. A statutory presumption such as s. 37(d) is a statutory direction as to the presumption that may be drawn: *Tong Peng Hong v. PP* [1955] MLJ 232. It operates and applies in place of evidence that he has possession of the drug and knew the nature thereof: see *Ng Kim Huat v. PP* [1961] MLJ 308. That phrase means that he must prove the contrary on a balance of probabilities: *Public Prosecutor v. Yuvaraj* [1969] 2 MLJ 89; *PP v. Mohd Noor Jantan* [1979] 2 MLJ 80; *PP v. Wong Moy* [1983] 2 MLJ 280.

The narrative of the prosecution case in respect of the offence as charged is that at about 5am on 16 December 1997, under the Jembatan Lebuh Raya KESAS, Desa Petaling, Sungai Besi, Daerah Cheras, in the Federal Territory of Kuala Lumpur, as a person who is not authorised under ss. 4 and 5 of the Dangerous Drugs Act 1952, the appellant was found to have in his control 55 plastic packets of cannabis weighing 132.4 grams. That the appellant is not a person who is authorised under ss. 4 and 5 of the Dangerous Drugs Act 1952 is stated by s. 36 Dangerous Drugs Act 1952 to be not a matter the burden of which is upon the prosecution to prove:

> 36. Burden of proof.
>
> It shall not be necessary in any proceedings against any person for an offence against this Act to negative by evidence any licence, authorization, authority, or other matter of exception or defence, and the burden of proving any such matter shall be on the person seeking to avail himself thereof.

That the appellant did not know how the dangerous drugs cannabis came to be in his bag, that it could have been placed into the bag by other persons is part of the defence case. PW4, PW5 and PW6 who were in the car with the appellant at the time the drugs were found, gave evidence for the prosecution they did not place any such drugs in the bag. It is not, and it has never been for the prosecution to prove how the dangerous drugs came to be in the bag. All that the law requires, in utter common sense, is that such persons as may have access to the bag are excluded. Since the narrative of the prosecution case is that the dangerous drugs cannabis was found in the bag in the car under the Jembatan Lebuh Raya KESAS, Desa Petaling, Sungai Besi, Daerah Cheras at about 5am on 16 December 1997, the prosecution had fully discharged that burden by calling PW6, PW7 or PW8 who were present when the bag was found in the car, that they did not place the dangerous drugs cannabis into the bag. That other persons may have access to the bag and could have placed the dangerous drugs in the bag in the appellant's room is the appellant's defence. It is not for the prosecution to prove that the

appellant's mother, brother, niece or friends did not place the dangerous drugs in the bag in the appellant's room. That burden is clearly upon the appellant, and he must so prove, in view of the application of s. 37(d), on a balance of probabilities.

The appellant's argument that the prosecution question in cross-examination of the appellant that his evidence of others having access to his room was his invention means that the prosecution case includes the fact that the accused room was always locked and never frequented by others, simply seeks to manipulate the narrative of the prosecution case away from the charge, that is, of possession of the dangerous drugs cannabis at about 5am on 16 December 1997, under the Jembatan Lebuh Raya KESAS, Desa Petaling, Sungai Besi, Daerah Cheras, in the Federal Territory of Kuala Lumpur, and evade the fact that the dangerous drugs could have been put into the bag by others is actually a defence and not part of the prosecution case. In the circumstances *Ti Chuee Hiang v. PP* [1995] 3 CLJ 1 SC did not apply against the prosecution to call the appellant's mother, brother and niece or any of them. The learned judge in the sessions court was fortunately not misled.

Given that the burden is upon the appellant to have proved on a balance of probabilities that someone else could have placed the drugs into the bag, the question before the court is whether he has discharged that burden of proof.

To PW7 it was suggested that if PW6 or PW8 did anything with the bag he PW7 would not have seen. PW7 agreed. But it was not put to PW6, who was called earlier, that PW6 did anything with the bag, or more specifically, put the cannabis into the bag. Nor was that question put to PW8. Having called PW6, PW6 and PW6, the prosecution had more than discharged its burden of showing the persons in the car at the time and who has access to the bag did not have anything to do with the cannabis found. In addition, the defence did not put to these witnesses that they put the dangerous drugs into the bag.

That the appellant's brother, mother, niece or friends could have put the cannabis into the bag when it was in his room is part of the defence case. The appellant's testimony that other persons had access was challenged by the prosecution in cross-examination as his invention. The appellant did not agree. The question put the appellant upon notice that his testimony was not conceded by the prosecution. Since a) the burden is upon the appellant to prove his allegation other persons had access to his room upon a balance of probabilities; b) his own evidence is that they had access to the house; c) he contradicted himself that his brother, mother, niece or friends had gone to his room, that night; d) all the prosecution evidence through PW6, PW7 and PW8 is that they did not see other occupants while they were in the appellant's room with the appellant, there is no duty arising upon the prosecution to call the

appellant's mother, brother, niece and friends that they had not entered the appellant's room after the appellant had packed his bag and left the room, and put the cannabis into the bag. The appellant had simply conjured up the chimera or vision that his mother, brother, niece or friends could have placed the cannabis into the bag, but had not sought to prove his defence upon a balance of probabilities that they or any of them at least did enter his room in his absence that night. He therefore failed to prove that line of defence upon a balance of probabilities.

The learned judge in his reasoning above, simply demonstrated that while it is always possible that someone could place cannabis into the bag, it was not in the least probable his mother, brother, niece or friends would enter the room in his absence. Unless of course there is evidence to show that they did. That learned judge showed by his reasoning that he did not believe the appellant's explanation, that the explanation did not raise a reasonable doubt. The learned judge therefore complied with *Mohamed Radhi bin Yaakob v. PP* [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC.

Counsel ought to pay close attention to the evidence before proceeding to advance their arguments. Without being solidly based upon the evidence, such arguments are at best assumptions, speculations, mere suspicions and conjecture, and regrettably, not worthy of consideration. The principle that a decision must be based on the evidence adduced and nothing else (*Sia Soon Suan v. PP* [1966] 1 MLJ 116 FC) applies not just upon the prosecution but also the defence. There was no evidence proved by the defence on a balance of probabilities that other persons had access to the bag that the dangerous drugs cannabis was found, that night, for the principle in *Abdullah Zawawi bin Yusoff v. PP* [1993] 4 CLJ 1 SC to apply so as to require the prosecution to exclude it by evidence.

The above therefore also disposes off the third ground argued.

The submission in respect of the appeal on sentence is as follows:

> On issue of sentence – ms. 164 Rekod Rayuan – one of factor be considered on sentence was fact 132.4 gms was a large amount. Submit amount that was proved was not 132.4 gms but far less.
>
> Ms. 123 Rekod Rayuan – the chemist – carried physical & microscopic examination on the entire 132.4 gms of plant material. Line 18 – 25. Examined 100% of plant material.
>
> Issue I want to raise – no finding made by the chemist that the physical examination revealed that all the plant material was the same substance – i.e. one step further to say all of the plant material I examined. All 132.4 gms was cannabis. Here he did not.

> Then ms. 125 Rekod Rayuan – tests to confirm that the substance he examined was cannabis – but he only examined 33 gms.
>
> Submit conclusively he had only shown that 33 gms was cannabis. When samples are taken – if they are to reflect the entire bulk, then there must be a finding that the bulk is homogenised and the same. But his examination (physical), he did not say all 132.4 gms was all the same. We cannot assume.
>
> Submit he has only shown conclusively that 33 gms of the substance was cannabis, as set out in the charge. The weight being 33 gms – the sentence ought now reflect the smaller amount.

First of all, it seems exceedingly contradictory that this argument is raised in the submission in respect of sentence, but not in respect of the conviction for possession of 132.4 grams of cannabis. Secondly, the evidence in respect of the 132.4 grams of cannabis is on record from the chemist's report 7979/97-0 under s. 399 of the Criminal Procedure Code dated 6 January 1998 wherein the chemist said:

> I found the above 80 small plastic packets to contain a total of 132.4 grams of plant material, and on analysis I found this 132.4 grams of plant material to be cannabis.
>
> …..
>
> "Cannabis" is as defined in Section 2 of the Dangerous Drugs Act 1952.

The chemist, Cheong Meow Kioon (DW2) was called as a defence witness. In his testimony to examination in chief, he had testified that he could from experience identify positively cannabis from the visual and microscopic examination if the material was fresh and he confirmed, without contradiction from the defence that the material was fresh. Thus there was evidence that all 132.4 grams of exhibit is cannabis. He did the third and fourth tests on 18 representative samples not because of any doubts but because of departmental procedure. It was not put to him he could not do so. In view of his unchallenged expertise and experience, there is no reason not to accept this testimony.

The nett weight of the representative samples was about 33 grams. The fact the samples were representative was not challenged. That being the case, the positive results from the 3rd and 4th tests showing the 33 grams of samples to contain cannabinoids, serve to confirm that all of the 132.4 grams of plant material he found to be cannabis under the visual and microscopic examination of 100% of plant material, was cannabis.

In the circumstance I find the submission to be imprecise and to contain absolutely no merit. The appeals against conviction and sentence contain no merit whatsoever and are therefore dismissed.

Although it has no effect of the above decision it is nevertheless pertinent to make the following general comment. Counsel had submitted:

> Submit conclusively he had only shown that 33 gms was cannabis. When samples are taken – if they are to reflect the entire bulk, then there must be a finding that the bulk is homogenised and the same. But his examination (physical), he did not say all 132.4 gms was all the same. We cannot assume.

Whether the bulk is homogenised is not the issue. It applies when actual content has to be obtained, where to ensure the sample is representative of the original bulk, that bulk is homogenised before the sample is extracted. That applies to analysis for drugs such as heroin. With regard to cannabis, the offence does not lie in the content of cannabinoids, but in the fact the material is the plant material cannabis as defined in s. 2 of the Dangerous Drugs Act 1952. The visual and microscopic examination determined that the bulk is homogeneous, that is that it is all of the same plant material. I have already dealt with the issues of identification and weight above.

While counsels have a right to appear and plead before the courts on behalf of their clients, and therefore have a duty to make submissions on their behalf, they must not forget they have a responsibility for the submissions that they make. They are not simply parrots for their clients, saying for the clients what they want. The interest of the client that he must uphold fearlessly is not to obtain an acquittal at all costs, but only that the client is entitled to, nothing less. The interest of justice, which he must uphold equally fearlessly means also that the client is not entitled to more than what is just to him. This he can best achieve by not practising any deception, but by practising candour, courtesy and fairness, referring only to facts that he is in a position to prove, not misquoting, and to apply himself to bringing all relevant binding decisions that he is aware of and immediately in point, whether it be for or against his contention. He must apply himself so that he is knowledgeable and precise as to what he is submitting upon. The dignity and standing of counsel, and that of his profession, unlike that of spectator sports and its contestants, is measured by this honourable criterion. The triumph in which we can all exult together, is in that justice is done, and nothing less.